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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 22 2010

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be an information technology services business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

As set forth in the director's denial, the primary issue in this case is whether the petitioner has established that it will permanently employ the beneficiary on a full-time basis in the offered position. The AAO will also consider whether the petitioner has established that the beneficiary is qualified for the offered position, and whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.[2]

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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[1]Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

[2]An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States,* 229 *F.* Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

[3]The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On the petition, the petitioner claims to have been established in 1993, employ approximately 200 workers, and earn approximately $15 million in annual sales. The petition and labor certification state that the petitioner is headquartered at [redacted] in San Jose, California, and that the beneficiary will be employed at that address.

On August 30, 2006, the director issued a request for evidence (RFE). The RFE instructed the petitioner to:

- Clarify whether the beneficiary will work in-house, or be contracted out. If the beneficiary will be contracted out, provide a copy of any contracts relating to where the beneficiary will, in fact, be working.

- Submit quarterly wage reports from the State of California Employment Development Department (EDD) for the first two quarters of 2006.

- Submit a federal tax return or audited financial statements for 2005

- List of all petitions filed by the petitioner on behalf of other beneficiaries. The list must include the receipt number of each petition, and the name and date of birth of each beneficiary. Further, for each beneficiary, the petitioner must establish its ability to pay the proffered wage.

In response to the RFE, the petitioner submitted:

- Confirmation that the beneficiary "will be contracted to the field," and a copy of a one-page appendix to a contract between the petitioner and [redacted] The appendix indicates that [redacted]. has a contract with [redacted] and that the petitioner will be contracting the beneficiary to [redacted], which, in turn, will be contracting the beneficiary to Wells Fargo for a six month term.

- Petitioner's 2005 Form 1120S, U.S. Income Tax Return for an S Corporation. The tax return states that the petitioner: is headquartered at [redacted] was established on March 10, 1993; earned $19,020,791.00 in gross sales and $222,962.00 in net income; paid $150,000.00 in officer compensation; had a payroll of $8,205,508.00; and had net current assets of $564,452.00.

- Quarterly wage reports for the first and second quarters of 2006 for California, Pennsylvania, District of Columbia, Florida, Connecticut, Washington, Oregon, Texas, Ohio, North Carolina, Arkansas, Illinois, Massachusetts, Virginia, Minnesota, New Jersey, Delaware, Michigan and Maryland. The submitted quarterly wage reports for the first quarter of 2006 indicate that the petitioner has approximately 87 employees.

It is noted that the petitioner did not submit the requested information pertaining to petitions filed on behalf of other beneficiaries. Nor did the petitioner provide any evidence or explanation of its

ability to pay each beneficiary, other than to state that it has over $19 million in sales, $222,962.00 in net income, and over 200 employees. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The appeal will also be dismissed, and the petition denied, for this reason.

Further, the petitioner claims to have over 200 employees, yet the submitted quarterly wage reports for the first quarter of 2006 indicate that the petitioner only employs approximately 87 workers. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

On February 12, 2007, the director issued a notice of intent to deny the petition (NOID). The NOID states that the petitioner did not establish that the beneficiary will be employed in a permanent, full-time position. The director noted that prior petitions filed by the petitioner stated that it was a "temporary agency." The director also noted that the petitioner was contracting the beneficiary to a client who was again contracting him out to a third party. Finally, the director informed the petitioner that a search of public records indicate that its corporate status in the State of California had been suspended since 2003.

The petitioner's response to the NOID states that it has employed the beneficiary for over two years and has contacted him to several companies. The petitioner claims that the size of its operations, together with its history of employing the beneficiary, establishes that it will employ the beneficiary in a full-time permanent position. Regarding the suspension of its corporate status, the petitioner claims that it is incorporated in the State of New Jersey and is licensed to do business in California. The petitioner further states that a company with the same name was incorporated in California, but it is no longer an active business. The petitioner claims that it is still active and is the actual petitioner in the instant matter.

The NOID response included a certificate of status as a foreign corporation issued by the California Secretary of State on June 30, 2004. The certificate states that the petitioner has been registered as a foreign corporation with the state of California since July 16, 1996. The petitioner also attached printouts from the State of California Secretary of State Business Entity website, http://kepler.sos.ca.gov/cbs.aspx, which indicate that it is an active corporation in the State of California and indicate that another corporation with its same name and almost identical address is no longer active.

On May 7, 2007, the director denied the petition. Citing 20 C.F.R. § 656.3 as defining

"employment" as "permanent full-time work by an employee for an employer other than oneself," the director concluded that the petitioner failed to establish that it will permanently employ the beneficiary on a full-time basis in the offered position. The director stated that the beneficiary did not appear to be employed by the petitioner nor was there any evidence that he would be employed in the event a new client could not be found. Specifically, the decision states:

> The evidence does not indicate that the petitioner is actually offering a full-time job to the beneficiary, but rather is finding the beneficiary a job and collecting contract wages from the petitioner's client. There is no evidence for what duties the beneficiary would perform during the times in which a contract has not been found for the beneficiary or what duties the beneficiary performs during times between contracts.

The director also questioned the petitioner's explanation of its business operations in California, stating that the "contradictory evidence and statement throw into question the information provided with regard to the Service's inquiry on the matter." The director denied the petition accordingly.

On appeal, counsel claims that the petitioner is, in fact, offering the beneficiary a permanent position regardless of the duration of individual consulting projects. The appeal brief states:

> **The Petitioner categorically assures USCIS that it is the W2 employer that will provide FULL TIME YEAR ROUND EMPLPYMENT**[sic]**_ TO THE BENEFICIARY regardless of one project ending or another project commencing.**

(Emphasis in original). However, the counsel provides no evidence in support of this claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence in the record is sufficient to establish that the petitioner is a *bona fide* business with active corporate status in the State of California. Further, a current review of the State of California Secretary of State Business Entity website (http://kepler.sos.ca.gov/cbs.aspx, accessed February 3, 2010) confirms that the petitioner is still an active corporation in the State of California.

However, the petitioner has failed to establish that it will actually employ the beneficiary in the offered position. The fact that the petitioner contracts the beneficiary to another entity which, in turn, subcontracts the beneficiary to a third party raises issues regarding whether the petitioner is and will be the beneficiary's actual "employer." The mere existence of paystubs or Forms W-2 do not necessarily mean that the beneficiary is or will be an employee of the petitioner. Other than unsupported statements of counsel and copies of the beneficiary's paystubs and Forms W-2, the petitioner has provided no evidence establishing that the beneficiary will, in fact, be employed, permanently or otherwise, by the petitioner. The petitioner has also provided no evidence that it will

continue to pay the beneficiary during periods that there is no contract available. There is no evidence that the beneficiary will report to a manager employed by the petitioner; rather, it appears the beneficiary will report to, and be controlled by, the third party client. Once again, going on record without supporting documentation is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

In addition, it is clear that the petitioner does not intend to employ the beneficiary in the position set forth on the labor certification and in the petition. Both the petition and the labor certification state that the worksite of the offered position is at the petitioner's [redacted] address. But the petitioner now concedes that the beneficiary will be employed at multiple worksites at several companies in locations potentially located throughout the United States. This is a materially different position than the one certified by the DOL and represented to USCIS.

Accordingly, the petition will be denied because the petitioner failed to submit sufficient evidence establishing that it will be the employer of the beneficiary and because the petitioner failed to establish that the petition is accompanied by a labor certification pertaining to the position.

Beyond the decision of the director, the petitioner has not established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary is issued lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the July 7, 2005 priority date, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The proffered wage stated on the labor certification is $97,490 per year. According to the tax returns in the record, the petitioner is structured as an S corporation with a fiscal year based on a calendar year.

The director noted that the petitioner has filed petition on behalf of multiple other beneficiaries. Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wage to each beneficiary as of the priority date

of each petition and continuing until each beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144. The record in the instant case contains no information about the priority dates and proffered wages for the beneficiaries of the other petitions, whether the beneficiaries have withdrawn from the petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. There is also no information in the record about whether the petitioner has employed the beneficiaries or the wages paid to the beneficiaries, if any. The director specifically requested this information from the petitioner, but the petitioner declined to provide it. As is explained above, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Although the petitioner has substantial operations, it has not established its ability to pay the proffered wage for the beneficiary and the proffered wages to the beneficiaries of the other petitions.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Further, the petitioner has also not established that the beneficiary is qualified for the offered position. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. While no degree is required for this classification, 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification."

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Iwine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coorney,* 661 F.2d 1 (1st Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. at 159; *see also Matter of Katigbak,* 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the submitted labor certification states that the offered position requires an individual with a master's degree or a bachelor's degree and five years of experience as a software engineer or senior developer. The beneficiary does not possess a master's degree. The record contains the following employment experience letters:

- Employment experience letter by [redacted] of Novel

[redacted], dated September 30, 2002. The letter states that the company employed the beneficiary as a software engineer from May 20, 2002 to September 5, 2002.

- Employment experience letter by [redacted]., dated July 10, 2002. The letter states that the company employed the beneficiary as a senior developer from September 10, 2001 to May 2002.

- Employment experience letter by [redacted] dated January 17, 2002. The letter states that the company employed the beneficiary as a senior member, technical staff from September 1, 2000 to September 10, 2001.

- Employment experience letter by [redacted], dated January 7, 2002. The letter states that the company employed the beneficiary "on a regular basis" from May 1, 2000 to September 1, 2000. The letter does not state the beneficiary's title or duties. The letter does not state whether the beneficiary was employed on a full-time basis. Accordingly this letter does not meet the requirements of 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A), which require evidence relating to qualifying experience to be in the form of letters from current or former employers and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien.

- Employment experience letter by [redacted] dated April 28, 2000. The letter states that the company employed the beneficiary as a senior application developer from December 15, 1997 to April 28, 2000. Another letter of [redacted] dated December 15, 2001, also states that the company employed the beneficiary as a senior application developer from December 15, 1997 to April 28, 2000. It is noted that this experience was not listed on the labor certification. A beneficiary's claim of prior employment experience that is not stated on the labor certification raises questions as to its credibility. *See Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976).

Taken together, these letters do not establish that the beneficiary obtained at least five years of experience as a software engineer or senior developer. Thus, the petitioner has not established that the beneficiary possesses the educational qualifications required to perform the proffered position.[4] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's

[4]Further, without establishing that the beneficiary has five years of progressively responsible post-baccalaureate experience, the beneficiary also does not possess the equivalent of an advanced degree. 8 C.F.R. § 204.5(k)(3). The petition also cannot be approved for this reason.

enumerated grounds. *See Spencer Enterprises, Inc. v. United States,* 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.